No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

I. The Accrual of a Civil RICO Action Should Be Governed By the Injury-and-Pattern Discovery Rule; the Alternatives Are Unworkable and Unjust 2

A. Only the injury-and-pattern accrual rule gives effect to both the plaintiff's injury and to civil RICO's essential element, the pattern of racketeering activity 3

1. The essence of civil RICO is its pattern of predicate acts 4

2. Only the injury-and-pattern rule will serve the remedial purposes of civil RICO 6

B. The attacks on the injury-and-pattern rule by the Respondents and their Amici are unwarranted 8

1. Under civil RICO, the policy of uncovering criminal racketeering enterprises overrides traditional interests in repose 8

2. The alleged "14-year statute of limitations" is not unique to the injury-and-pattern accrual rule 10

3. The difficulty of defining and proving a pattern of racketeering activity exists under any RICO accrual rule; proving knowledge of that pattern does not add another layer of difficulty 11

TABLE OF CONTENTS – Continued

Page(s)

C. The accrual rules advocated by the Respondents and their Amici are unjust and impractical 12

1. The injury discovery rule is unjust and impractical 12

2. The Clayton Act's injury-occurrence rule is even more unjust and impractical 17

II. If the Injury-and-Pattern Discovery Rule Is Applied to this Case, the Summary Judgment Must Be Reversed 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967) 18

H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 5, 8, 11

Irwin v. Department of Veteran's Affairs, 498 U.S. 89 (1990) 13, 14, 15

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997)..... 17, 18

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 10

Reading Co. v. Koons, 271 U.S. 58 (1926) 18

Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479 (1985) 6, 8

United States v. Beggerly, 118 S. Ct. 1862 (1998)..... 15

United States v. Kubrick, 444 U.S. 111 (1979) 5

STATUTES

Pub. L. 91-452, §904(a), 84 Stat. 947..... 6

ARGUMENT IN REPLY

Despite attempts to minimize Mark Rotella's injury, the Respondents do not dispute that his damages arise from a classic RICO scheme. As the Respondents have admitted in their own pleadings presented as summary judgment evidence in this case, Psychiatric Institutes of America (PIA) owned 70 mental hospitals in 22 states, and it entered into an illegal nation-wide scheme to compensate doctors for referring patients to its hospitals. *See generally* J.A. 137, 139-44. After being charged in a federal information, PIA pleaded guilty to conspiring with the same doctors who are defendants here.[1] Thus, Mark's financial injuries, which not only include personal items, but also billing for 479 days of unnecessary treatment, J.A. 20, Pet. Br. at 3, were suffered as part of this nation-wide scheme to defraud many patients of many thousands of dollars. This is precisely the kind of illegal activity for which RICO was designed to provide a civil remedy.

Yet, in the most glaring flaw in the Respondents' argument, they completely fail to identify anything that Mark could have – or should have – done either to learn of or preserve his civil RICO claims within four years after his discharge from Brookhaven. The Respondents do not identify any case from this Court that bars a cause of

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[1] Although the language of this federal information appears in this record as a citation to paragraph 29 of Plaintiff's Original Complaint, *see* J.A. 20-24, that paragraph of the complaint directly quotes from the federal indictment, and all defendants admit that paragraph 29 accurately quotes the information. *See* J.A. 46, 61, 77.

action based on limitations without pointing to *some* lack of diligence by the plaintiff. The Respondents have not answered the challenge issued in our opening brief to explain how an eighteen-year-old former mental patient could be expected to uncover, starting in 1986, a classic RICO scheme, when the Federal government was not even able to expose this racketeering activity fully until 1994. *See* Pet Br. at 19-20.

I. The Accrual of a Civil RICO Action Should Be Governed By the Injury-and-Pattern Discovery Rule; the Alternatives Are Unworkable and Unjust.

Our opening brief pointed to this Court's admonition, in choosing an accrual rule, to focus on the general purposes of a statute and the practical effects of its application. Pet. Br. at 10-11. Rather than heeding this Court's admonition, the Respondents and their Amici seek a different starting point, something they call the "traditional federal accrual rule." But, as with most appeals to tradition, no one can agree on what the "tradition" is. The Respondents say that "courts have fashioned an equitable discovery component as part of the traditional federal accrual rule," *see* Resp. Br. at 11. By contrast, ACLI directly disagrees, saying that "the discovery rule is not the 'general' or 'presumptive' accrual rule." ACLI Br. at 17. This appeal to a "traditional" rule (whatever it is) is designed to eliminate any analysis of RICO's remedial purposes or the impracticalities of applying an injury-focused accrual rule.

Most would agree that civil RICO is far from a "traditional" cause of action. Despite civil RICO's admittedly

unique structure, the accrual rules posited by the Respondents and their Amici focus only on a traditional injury. This approach disregards civil RICO's essence, the hidden and secretive predicate acts that are necessary to state a valid claim. Moreover, such a myopic injury-focused approach ignores the remedial purposes of the statute.

A. Only the injury-and-pattern accrual rule gives effect to both the plaintiff's injury and to civil RICO's essential element, the pattern of racketeering activity.

Even under their "traditional" or "default" accrual rule, the Respondents concede that all the elements of a RICO claim have to exist before the cause of action accrues. Resp. Br. at 19. But the focus, they say, must be on discovery of the injury alone, to the exclusion of all other required elements of the claim. This approach ignores the statute's structure.

In most tort cases, an injury completes the cause of action because the injury is the last element to occur. With civil RICO's unique structure, however, an injury-producing event does not necessarily complete the claim. The plaintiff's injury can occur more than four years before the second predicate act in the pattern. The civil RICO cause of action is therefore unique, and an accrual rule limited to injury alone will not work. Although a necessary component of the claim, injury alone is never sufficient to state a RICO cause of action.

Because RICO is unique, there is no reason to use a one-size-fits-all accrual rule, even one used in some other

contexts. Under the Respondents' injury-focused accrual rules civil RICO's structure could preclude even a diligent plaintiff from bringing a timely suit. By advocating "traditional" or "default" accrual rules, the Respondents and their Amici simply beg the question. They have not explained why their rule is applicable to a unique statute like RICO.

1. The essence of civil RICO is its pattern of predicate acts.

It makes no sense to allow for discovery of injury, but to disallow discovery of the pattern of racketeering activity. Both elements are required for a RICO claim to exist, let alone be discovered. And, as the Respondents and their Amici concede, a civil RICO claim cannot accrue until all these elements have occurred. Resp. Br. at 8, WLF Br. at 8.

Although all elements of a RICO claim must first exist, the Respondents and ACLI argue that the pattern element is unimportant, because the injury a plaintiff suffers is a consequence of the predicate acts, not the pattern. ACLI Br. at 13, Resp. Br. at 12-13. No "conceivable reason" exists, ACLI argues, for the accrual rule to be tied to something other than the injury-producing predicate act. ACLI Br. at 13. But a plaintiff who becomes the victim of a predicate act, such as fraud, still has no RICO claim. After all, it is not until the first predicate act combines with another predicate act that the victim has a RICO claim, as opposed to a simple common-law fraud claim.

In most tort cases, injury is the most obvious event, and the most easily known, because it is personal to the plaintiff. In civil RICO, however, the pattern of racketeering activity is what is difficult to know, what is hidden, what is harder to discover. Thus, RICO differs from most torts in which a plaintiff discovers causation or negligence, or injury alone. As a rule, those elements of tort claims are not inherently hidden. As noted in *United States v. Kubrick*, 444 U.S. 111 (1979), in those situations a plaintiff should be able to ascertain that he has a cause of action if he has possession of the pertinent facts.[2]

The Respondents urge this Court to select an accrual rule that requires discovery of injury alone, because the language of the RICO statute focuses on the injury, not the pattern. But they nonetheless quote the definition of a RICO offense as "conducting an enterprise through a *pattern* of racketeering activity." Resp. Br. at 9 (emphasis added). They then explain that the phrase "*pattern* of

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[2] Both the Respondents and ACLI latch onto *Kubrick* to argue that limitations begins before a plaintiff has full knowledge of his legal rights. But *Kubrick* is a medical malpractice case brought under the limited waiver of sovereign immunity afforded by the Federal Tort Claims Act. Whatever policy is served by protecting government health care providers under the FTCA, a different policy is at work under RICO, which is meant to attack the "predations of mobsters." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989). In the medical malpractice arena, when a plaintiff submits to medical care and an injury follows, the plaintiff is on inquiry notice that the medical care caused the harm. This RICO claim is different; although Mark may have been on inquiry notice of a possible malpractice claim (which he has lost on limitations) nothing informed him of a possible RICO violation.

racketeering activity" is defined in section 1961(5) of the statute. *Id.* (emphasis added). Again, plaintiffs quote this Court's language in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985), that a RICO violation requires "(1) conduct (2) of an enterprise (3) through a *pattern* (4) of racketeering activity." *Id.* at 496-97, quoted in Resp. Br. at 9 (emphasis added). Finally, the Respondents argue that, in order to obtain civil damages, section 1964(c) requires an injury "by reason of a violation of section 1962." Resp. Br. at 10. The Respondents reason that, because there is no right to civil damages unless an injury has occurred, discovery of injury should trigger accrual. Yet, by the same token, there is no right to damages unless a violation of section 1962 occurs, and there can be no violation of section 1962 without a pattern of racketeering.

Accordingly, both elements of the offense are required by the statute. If the language of the statute determines the accrual rule, an accrual rule should be chosen that incorporates both the injury and the pattern of racketeering activity. The Petitioner's rule incorporates both elements; the Respondents' suggested rule, by focusing on injury alone, only goes half-way across the canyon.

2. Only the injury-and-pattern rule will serve the remedial purposes of civil RICO.

In answer to this Court's admonition that "RICO is to be read broadly," *Sedima*, 473 U.S. at 497, and the express Congressional directive that RICO shall be "liberally construed to effectuate its remedial purpose," Pub. L. 91-452, § 904(a), 84 Stat. 947, the Respondents and their Amici

answer that liberal construction is nothing more than a "by-now tired" "bromide." ACLI Br. at 24. The Respondents and their Amici ignore the admonitory language of liberal construction when it is inconvenient, but they fully embrace congressional language in the Clayton Act when it suits them.

On balance, the choice between accrual rules comes down to a decision between whether the chosen rule will advance the statute as "a new method for fighting crime," *id.* at 498, or whether the accrual rule will insulate RICO perpetrators from liability because they hide their pattern of racketeering from discovery.[3] An injury-focused rule will punish diligent plaintiffs and sacrifice the remedial ends of the statute because RICO enterprises will remain undiscovered. On the other hand, if the accrual date is delayed until diligent plaintiffs should have discovered the RICO pattern, deserving plaintiffs will be able to sue, and the statute's "aggressive initiative" will be served. *Id.*

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[3] Even the WLF concedes, as it must, that "many RICO cases involve claims of fraud where the fact of injury may not become apparent for years. . . . " WLF Br. at 9, n.3. It also concedes that numerous letters sent in connection with the PIA/doctor conspiracy here constitute mail fraud. *Id.* at 10 n.5; these claims are clearly pleaded here, contrary to the Respondents' erroneous statements. *Compare* Resp. Br. 24-25 *with* J.A. 29, ¶40 (mail fraud); J.A. 31, ¶43 (wire fraud); J.A. 32, ¶44(4) (mail and wire fraud); J.A. 35-36, ¶48 (mail and wire fraud).

B. The attacks on the injury-and-pattern rule by the Respondents and their Amici are unwarranted.

1. Under civil RICO, the policy of uncovering criminal racketeering enterprises overrides traditional interests in repose.

The Respondents and their Amici all argue that statutes of limitations must provide repose, "certitude," and freedom from stale claims. *See* Resp. Br. at 18, 23-24; ACLI Br. at 14-15; WLF Br. at 7-8. However, these policies must be balanced against the significant policy of providing diligent plaintiffs a reasonable period within which to discover and sue illegal RICO enterprises.[4] *See, e.g., Sedima*, 473 U.S. at 498; *H.J., Inc.*, 492 U.S. at 245.

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[4] To the extent that the loss of absolute certainty and repose is a concern, it is not unique to the injury and pattern discovery rule but would exist under any RICO accrual rule.

Under an injury-discovery rule, the WLF admitted in its amicus brief, "in some cases . . . the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category." WLF Br. at 9 n.3.

Even the ACLI's proposed injury occurrence rule allows for some delay and uncertainty, because injury will not always occur immediately upon the defendant's wrongful act. For example, suppose that the parties in this case entered into an illegal referral compensation scheme in 1984, but a patient was not wrongfully hospitalized and deprived of his property until 1990. The patient's claims would not be barred until 1994. Thus, regardless of the accrual rule chosen, there always will be potential uncertainty and exposure to older claims on the part of RICO defendants.

Moreover, the Respondents make erroneous assumptions about the nature of the injury-and-pattern discovery rule and the motivation of RICO plaintiffs. The Respondents argue that the rule proposed by Rotella "would permit plaintiffs who know of the defendant's pattern of activity 'simply to wait, sleeping on their rights . . . as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the memories of witnesses have faded or evidence is lost.' " Resp. Br. at 20; *see also* ACLI Br. at 12 (the injury and pattern discovery rule "would permit *every* civil RICO plaintiff potentially to wait years before commencing suit.").

These predictions ignore the requirements of the injury-and-pattern discovery rule. If, as the Respondents argue, a plaintiff *knows* of the pattern of racketeering, the cause of action accrues, the four-year statute of limitations chosen by this Court begins to run, and if the plaintiff waits, sleeps on his rights, and postpones filing suit, his claims will be barred. Similarly, ACLI's argument that "*every* civil RICO plaintiff" could wait years before filing suit ignores the diligence requirement inherent in the injury-and-pattern discovery rule. Under the injury-and-pattern rule, when a civil RICO plaintiff knows, or *should* know, about the injury and pattern of racketeering, he has only four years to file suit. Thus, a plaintiff who deliberately chooses to remain ignorant about a discoverable pattern of racketeering will find his claim barred by limitations, because the clock starts running when a plaintiff knows or *should* know about both his injury and the pattern of activity – a requirement that the Respondents and their Amici ignore. No plaintiff could simply

choose to wait many years to file suit out of a desire to speculate on increased damages or weakened evidence.

In the real world, civil RICO plaintiffs would have no motivation to postpone suit until "evidence has been lost, memories have faded, and witnesses have disappeared." ACLI Br. at 14, citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). The loss of evidence, memory, and witnesses over time is a two-edged sword, since RICO plaintiffs have the burden of proof. It is unlikely that RICO plaintiffs would deliberately engage in stalling maneuvers that would complicate their ability to satisfy that burden.

2. The alleged "14-year statute of limitations" is not unique to the injury-and-pattern accrual rule.

The Respondents and one of their Amici argue that the injury-and-pattern accrual rule makes it possible for a plaintiff to wait as long as 14 years after the first predicate act to bring suit. *See* Resp. Br. at 20, ACLI Br. at 16. Although this far-fetched scenario is theoretically possible because of the way that Congress wrote the law, the possibility exists regardless of which accrual rule is chosen. A pattern of racketeering activity consists of at least two predicate acts, which cannot be more than ten years apart. Assuming the extreme – but unlikely – scenario that the first two predicate acts happen 9 years and 364 days apart, the cause of action could not accrue any sooner than the last day, because the parties agree that limitations could not start until all elements of the cause of action exist. *See* Resp. Br. at 19. Under any accrual rule,

the earliest that the four-year limitations period would expire is 13 years and 364 days after the first predicate act. In other words, the "14-year statute of limitations" is a product of the statute as written; it is not a product of the injury-and-pattern discovery rule.

3. The difficulty of defining and proving a pattern of racketeering activity exists under any RICO accrual rule; proving knowledge of that pattern does not add another layer of difficulty.

The Respondents argue that discovery of a pattern of racketeering activity would be unworkable because this Court and the circuit courts have struggled with how to define a pattern, and how to apply those definitions uniformly to difficult facts. *See* Resp. Br. at 20-23 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) ("developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task")). Yet the Respondents fail to acknowledge that it is the "statutory framework," not the accrual rule, that creates any difficulty.[5] Because a pattern is a necessary element of every RICO claim, any difficulty in defining and proving it will exist in every civil RICO case, regardless of which accrual rule is chosen. The

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[5] In fact, the "pattern" element of civil RICO serves an important statutory purpose. By making that term "broad" and "flexible," as this Court has described it, *see H.J., Inc.*, 492 U.S. at 238-39, the "expansive bounds," set by Congress make it more likely that criminal enterprises will be brought within its ambit.

Respondents cannot show that, once this hurdle is overcome, there will be any additional difficulty in allowing a jury to determine when that pattern – however it is defined – was known, or should have been known, to the plaintiff. This is yet another argument directed to the RICO statute itself, not to the injury-and-pattern discovery rule.

C. The accrual rules advocated by the Respondents and their Amici are unjust and impractical.

The Respondents and the WLF both suggest a RICO accrual rule based on the discovery of injury. The ACLI proposes a RICO accrual rule based on the mere occurrence of injury, whether known or unknown to the plaintiff. Both rules would produce unjust and impractical results.

1. The injury discovery rule is unjust and impractical.

The facts of this case illustrate the unfairness of the Respondents' proposed rule. Under their rule, the only two things required to start limitations running are the discovery of injury and the existence (albeit unknown) of the elements of the cause of action. The Respondents concede that if Mark's allegations are accepted as true, they "establish that all elements of his civil RICO claim existed before his discharge from Brookhaven" and that "he was aware of his alleged injuries at the time of his treatment at Brookhaven." Resp. Br. at 4. In other words, they say, the four-year statute of limitations began to run

in 1986. Yet no lawyer in good faith would have filed a RICO pleading against PIA or these Respondents based on what was known to Mark in 1986. No one would expect that, because Mark (like most mental patients) disapproved of his psychiatric treatment, he was on inquiry notice of an elaborate nation-wide scheme to compensate doctors who kept their patients in hospitals so that the hospitals could fraudulently tap insurance benefits. No one would think that an 18-year-old boy with limited resources should spend the next four years investigating a vast hospital holding company on a national level, or expect that his investigation would be successful, when federal investigators did not expose this scheme until eight years after Mark's discharge.

The Respondents and their Amici all admit the possibility of unfair and harsh results under their proposed rule, but toss a bone to RICO victims by saying they could invoke equitable tolling principles. *See* Resp. Br. at 19-20; ACLI Br. at 11-12; WLF Br. at 12. The WLF amicus brief refers to the "rare case in which a plaintiff, despite due diligence, is unable to learn about the defendant's pattern of racketeering activity." WLF Br. at 12. The ACLI suggests that "it is better to address that rare case through judicious use of . . . [equitable tolling doctrines] . . . which focus on the equities of each case. . . ." ACLI Br. at 12. Yet as this Court recognized, in the context of equitable tolling cases, "[T]o decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability. . . ." *Irwin v. Department of Veteran's Affairs*, 498 U.S. 89, 95 (1990).

The Respondents concede there will be cases in which a plaintiff, despite due diligence, cannot discover a pattern of racketeering activity within four years after an injury. Yet their proposed rule ignores the likelihood of unfairness in the accrual rule, and it would force plaintiffs to rely on narrow exceptions in the vain hope that they will ameliorate the harsh effects of an ill-considered rule. The WLF brief confidently assures that such equitable rules would only be needed occasionally, in "rare instances," and only if the plaintiff truly "needed" it. WLF Br. at 14-15.

Assuming that it is only the "rare" case in which a plaintiff exercising diligence could not discover the pattern of racketeering activity, then the injury-and-pattern rule will result in a longer limitations period only in the "rare" case. If the pattern is easily discovered in most cases, plaintiffs will not be afforded more time under a "should have known" discovery standard. But if Mark is correct in arguing that RICO perpetrators typically hide their illegal acts, diligent plaintiffs should be given the necessary time to discover those acts, without having to rely on additional, obscure tolling provisions. Moreover, if equitable principles are required in many, rather than only in "rare" cases, then equity should be encompassed within the accrual rule itself.

In fact, the exceptions offered by the Respondents and their Amici may not offer any relief to plaintiffs like Mark. As this Court has noted in reference to equitable tolling, "Federal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96. Specifically, this Court has allowed equitable tolling only when the plaintiff filed a defective pleading during the statutory

period, or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.; see also United States v. Beggerly*, 118 S. Ct. 1862, 1868 (1998). The first instance would not apply to Mark. The second probably would not, without proof that the doctors tricked Mark into allowing his deadline to pass. Accordingly, in a case like this one, the equitable tolling principles probably would offer no solace at all.

More importantly, it is unlikely that equitable principles would apply at all if the Respondents' proposed injury discovery rule were adopted. This Court has noted that, when the commencement of a statute of limitations is based on a "knew or should have known" standard, the accrual scheme "has already effectively allowed for equitable tolling," and "equitable tolling would be unwarranted." *Beggerly*, 118 S. Ct. 1862, 1868. Although *Beggerly* involved statutory "knew or should have known" language in the Quiet Title Act, if this Court adopts an accrual rule based on when a plaintiff knew or should have known of an injury, the same principle could apply. If it does, then equitable tolling principles cannot exist in addition to the discovery rule. Thus, they will provide no relief to plaintiffs in this context.

Additionally, tremendous practical problems arise because of the impossibility of pleading a RICO cause of action in compliance with Rules 9(b) and 11(b) of the Federal Rules of Civil Procedure when a pattern of racketeering has not yet been discovered. The Respondents provide two superficial solutions to this impossible pleading predicament.

First, the Respondents suggest that a plaintiff could plead a RICO claim generally, and then amend the pleading to provide more specific details after discovery. Resp. Br. at 25-26. This assumes that a plaintiff has reason to believe that a RICO violation has occurred and that discovery might fill in the details. It offers no solution to innocent and ignorant victims like Mark, who have no basis for believing, and little ability to discover, that a RICO offense has been committed. Moreover, the Respondents' argument, and the adoption of the injury discovery rule, would encourage, if not compel, the filing of groundless suits and unsupported fishing expeditions by plaintiffs who are fearful that limitations may soon run on a cause of action.

Second, the Respondents suggest that plaintiffs with possible RICO causes of action could file and allege other theories of recovery, but add RICO claims later under the "relation-back" doctrine. Resp. Br. at 26-27. This argument assumes that a plaintiff has other causes of action that are worth filing. For example, in this case, Mark could have sued for conversion arising from the failure to return his personal effects upon discharge. But, as with most claims, the absence of RICO incentives like treble damages and attorneys' fees would make his lawsuit economically unviable. Contrast that conversion claim with Mark's discovery, eight years after discharge, that hospital and doctor charges for 479 days of unnecessary treatment were motivated by a nation-wide scheme to drain insurance policies. Upon that discovery, Mark's lawsuit became viable, but – under the Respondents' position – he was already out of time.

Once again, the Respondents offer an incomplete and unsatisfactory solution to a problem created by the rule that they propose. The solution lies not with ill-considered exceptions to the rule, but with choosing a rule of accrual that will produce a fair result in all situations.

2. The Clayton Act's injury-occurrence rule is even more unjust and impractical.

None of the lower courts to consider accrual, and not even this Court in *Klehr*, has advocated a retreat to the Clayton Act's injury-occurrence accrual rule. Instead, the majority in *Klehr* noted "that the Clayton Act's express statute of limitations does not necessarily provide all the answers." *Klehr*, 521 U.S. at 193. As presented by this Court, the question is not whether to return to the Clayton Act scheme, but how to resolve the "major difference among the Circuits," which this Court has characterized as "whether a discovery rule includes knowledge about a 'pattern.' " *Id.* at 192.

Only ACLI champions undying fealty to the Clayton Act rule. In attempting to sell a rule that has not been adopted in any circuit, ACLI argues that civil RICO violations are no more secretive than the "classic" price-fixing conspiracy under the antitrust laws, and it disdains the so-called "mix-and-match" approach of using the four-year Clayton Act limitations period while fashioning a separate, RICO-specific accrual rule. But ACLI is simply wrong to assert that most antitrust violations are just as secretive as RICO's hidden predicate acts. Admittedly, there are some secretive antitrust conspiracies that the Clayton Act accrual rule does nothing to help expose, but

as discussed in our opening brief, Pet. Br. at 15-21, the pattern of racketeering activity required for civil RICO liability is invariably concealed by complex, secretive schemes that are calculated to hide the criminal enterprise from the persons or businesses they victimize. Indeed, this Court has previously acknowledged that fraud is the most common predicate act in civil RICO violations. *See Klehr*, 521 U.S. at 191.

As we show above at pages 12 to 17, with its myopic focus on injury alone, the Clayton Act rule would produce harsh and unjust results. The solution for civil RICO is not to import the hobgoblin of an unfair and limited Clayton Act rule for the sake of a foolish consistency.

If an accrual rule is appropriate for RICO, it should not matter that it differs from the Clayton Act model. After all, the Court should not overlook RICO's substance for the sake of consistency with antitrust case law. As enacted by Congress, the RICO statute is a hybrid product of the Clayton Act remedies language, but with a liability scheme all its own. Consequently, a RICO-specific accrual rule is essential to effectuate "the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). A hybrid accrual rule that follows the Clayton Act injury model, but accounts for all elements of RICO's unique liability scheme, is not only appropriate, it is required to fulfill congressional purposes. This Court should adopt the injury-and-pattern discovery rule.

II. If the Injury-and-Pattern Discovery Rule Is Applied to this Case, the Summary Judgment Must be Reversed.

Our opening brief argued that if this Court chooses the injury-and-pattern discovery rule, that choice necessarily requires the reversal of the summary judgment. Pet. Br. at 28-29. None of the opposing briefs disagrees. If the injury-and-pattern accrual rule is applied, reversal is the only correct disposition.

CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted.

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